

D.P.U. 94-50

Petition of New England Telephone and Telegraph Company d/b/a
NYNEX for an Alternative Regulatory Plan for the Company's
Massachusetts intrastate telecommunications services.

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INTERLOCUTORY ORDER ON MOTION TO DISMISS OF THE NEW ENGLAND CABLE
TELEVISION ASSOCIATION; MOTIONS TO CONSOLIDATE OF MCI AND AT&T;
MOTIONS ON SCOPE OF NYNEX, AT&T, MCI, THE ATTORNEY GENERAL
AND NECTA; AND MOTION OF NYNEX TO DEFER TRANSITIONAL FILING

I. INTRODUCTION

On April 14, 1994, New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX" or "Company") filed with the Department of Public Utilities ("Department") documents described as revisions to its tariff, M.D.P.U. Mass. No. 10, for effect May 14, 1994, as part of an Alternative Regulatory Plan ("Plan") for NYNEX's Massachusetts intrastate operations. ¹ The matter was docketed as D.P.U. 94-50.

On April 28, 1994, the Attorney General of the Commonwealth ("Attorney General") filed a "Motion To Dismiss Petition Or To Require Additional Filings," seeking dismissal of the Company's filing, or in the alternative, (1) a finding by the Department that the Company's filing is not a proper tariff filing, (2) a two-phase investigation that includes a traditional rate case examination, and (3) a requirement that NYNEX make additional filings related to its revenue requirement. On May 24, 1994, the

¹ The Plan proposes a new form of regulation for NYNEX to replace the Department's existing rate-of-return regulation. Instead of continuing to regulate the Company's expenses, revenues, and earnings, the Department would only regulate the Company's prices, under a "price cap" form of alternative regulation. The "price cap" mechanism would allow the Company to change prices each year based on increases in inflation, less a pre-determined productivity factor, adjusted for exogenous cost changes.

Department issued an Order denying the Attorney General's request for dismissal but finding that the Company's filing was not a proper tariff filing. NYNEX, D.P.U. 94-50, at 14-17 (1994) (Interlocutory Order on Attorney General's Motion to Dismiss) ("Interlocutory Order"). The Department, therefore, vacated its Order of Suspension issued on April 20, 1994 and considered the Company's filing as a petition for alternative regulation to be examined within this docket. ² Id.

Besides the Attorney General's Motion to Dismiss, several other parties have filed procedural motions or pleadings with regard to dismissal, consolidation, or the expansion or limitation of the scope of this proceeding. They are described below.

On May 11, 1994, the New England Cable Television Association, Inc. ("NECTA") filed a Motion to Dismiss NYNEX's filing. Subsequently, NYNEX filed its Objection to the Motion, NECTA filed a Reply, and the Attorney General submitted Comments.

On May 9, 1994, MCI Telecommunications Corporation ("MCI") filed a Motion to Consolidate the Department's investigation in this proceeding, with the Department's investigation in D.P.U. 90-206/91-66. ³ NYNEX filed its Opposition to MCI's

² In the Order, the Department also denied the Attorney General's request for a two-phase schedule, and for NYNEX to make additional filings. Interlocutory Order at 16.
(continued...)

Motion, and MCI filed a Reply. In addition, Comments on MCI's Motion were filed by NECTA, the Attorney General, AT&T Communications of New England, Inc. ("AT&T"), Teleport Communications-Boston ("Teleport"), and MFS Communications Company, Inc. ("MFS").

On May 20, 1994, pursuant to a deadline established by the Hearing Officer, Motions on Scope were filed by NYNEX, MCI, AT&T,⁴ the Attorney General, and NECTA.⁵ Subsequently, AT&T filed its Opposition to NYNEX's Motion, and NYNEX filed Comments

³(...continued)

³ D.P.U. 90-206/91-66 is the Department's docket for investigation of collocation and interconnection issues. See NET Collocation, D.P.U. 90-206/91-66 (1991) (Order in which the Department approved a stipulation between NYNEX and Teleport Communications-Boston that established physical collocation of third-party transmission equipment within eight NYNEX central offices and established that collocation arrangements would be governed by NYNEX's exchange and access tariffs, M.D.P.U. Nos. 10 and 15, which provided guidelines for the general regulations and procedures associated with collocation); see also NET Collocation, D.P.U. 90-206-B/91-66-B (1994) (Department approved a stipulation between NYNEX and MFS Communications Company which revised NYNEX's collocation tariffs to, among other things, make collocation available at a number of additional central offices and serving wire centers, and lower monthly rates for cross-connection with a central office between NYNEX's main distribution frame and a collocater's multiplexing node).

⁴ AT&T's Motion on Scope was filed jointly with a Motion to Consolidate this proceeding with the Department's docket D.P.U. 90-206/91-66 (see Sections III and IV, infra).

⁵ Although termed "Comments," the pleadings of the Attorney General and NECTA requested specific relief. Therefore, we view these pleadings as Motions on Scope and will consider them as such.

on the Motions of AT&T and MCI.

With its Petition for Alternative Regulation of April 14, 1994, the Company filed a Motion to Defer the filing of its 1994 transitional rate design pending the Department's decision on the Company's Plan.⁶ The Department of Defense and All Other Federal Executive Agencies ("DOD"), AT&T, NECTA, and MCI filed their Oppositions to NYNEX's Motion to Defer and, thereafter, NYNEX filed a Reply.

II. NECTA MOTION TO DISMISS

A. NECTA

NECTA makes two primary arguments in support of its Motion

⁶ In D.P.U. 89-300, the Department conducted an examination of NYNEX's rate structure, representing the third phase in a multi-year investigation of NYNEX's rates. New England Telephone and Telegraph Company, D.P.U. 89-300 (1990). In its Order in that proceeding, the Department directed NYNEX to make a series of revenue-neutral transitional filings that would move rates to cost-based levels, in accordance with target rates set in that proceeding. Id. In D.P.U. 89-300, D.P.U. 91-30, D.P.U. 92-100, and D.P.U. 93-125, the Department approved specific rate changes in this transitional rate restructuring process that represented the first through the fourth steps, respectively, in the direction of target rates and a target rate structure. See Id.; New England Telephone and Telegraph Company, D.P.U. 91-30 (1991); New England Telephone and Telegraph Company, D.P.U. 92-100 (1992); New England Telephone and Telegraph Company, D.P.U. 93-125 (1994). In D.P.U. 93-125, the Department reiterated its commitment to the timetable established in D.P.U. 92-100 for completion of the transitional process in two additional filings, and, thus, required the Company to make annual filings in 1994 and 1995, resulting in the completion of the movement of rates to target cost-based levels. NET, D.P.U. 93-125, at 77 (1993).

to Dismiss. First, NECTA argues that the filing should be dismissed because it is patently deficient as a request for a general increase in rates under G.L. c. 159, § 20, in that it does not demonstrate that such a general rate increase is necessary for the Company to obtain reasonable compensation for its services (NECTA Motion at 3-6). Second, NECTA claims that the Department is without authority to review NYNEX's filing because current statutes do not provide for the type of alternative regulation the Plan envisions (id. at 6).

Regarding its argument relating to a general increase in rates, NECTA argues that, as a matter of law, the Company's rates are subject to a cost-based ceiling and can be no higher than is necessary to obtain a reasonable compensation (id. at 5-6, citing G.L. c. 159, § 20). NECTA maintains that while the Department has discretion to select a methodology that satisfies the requirements of G.L. c. 159, § 20, it cannot ignore revenue requirements in deciding whether rate increases are necessary to provide reasonable compensation (id. at 6). Because the Plan lacks any constraint on overall earnings, NECTA contends that NYNEX's filing also violates the requirement of G.L. c. 159, § 14 that rates must be "just and reasonable" (NECTA Reply at 2).

NECTA also claims that NYNEX's Plan is in conflict with, or renders unnecessary, G.L. c. 159, §§ 26, 31, 32, and 34A, which deal with the treatment of expenses, accounting and reporting

requirements, and affiliate transactions (NECTA Motion at 7). NECTA also notes numerous cost of service issues that it claims NYNEX has chosen to ignore, and NECTA cites the absence of information on these issues as illustration that the filing is patently deficient (id. at 10). NECTA points out that the Department previously dismissed a general rate increase filed by NYNEX because the Company's filing did not contain sufficient information for consideration in a general rate case (id. at 8, citing New England Telephone and Telegraph Company , D.P.U. 84-267, at 16 (1985)).

NECTA also maintains that the legislature required that there be a "nexus between NYNEX's revenue requirement and any maximum allowable rates," and that NYNEX's Plan is "fatally flawed" because it eliminates this nexus (NECTA Reply at 5).⁷ NECTA argues further that NYNEX's Plan ignores case law and Department precedent requiring that reasonableness of compensation be determined in relation to a cost of service measurement (id. at 3, citing Auditor of Commonwealth v. Trustees of Boston Elevated Railway , 312 Mass. 74, 77-78 (1942); Opinion of the Justices , 251 Mass. 569, 610-611 (1925); Boston

⁷ NECTA states that, contrary to NYNEX's assertion, its position is that the Department is compelled, as a matter of law, to dismiss NYNEX's filing, not that the Department is precluded from addressing a price cap model or other alternative ratemaking model that is consistent with statutory requirements (NECTA Reply at 2-3, n.1).

Consolidated Gas Co., 13 P.U.R 3d. 401, 411 (1956); The Railroad Passenger Rate Case, P.U.R 1915B 362, 369 (1915); New England Telephone and Telegraph Company, D.P.U. 16253 (1970).

Regarding NECTA's argument relating to the Department's statutory authority to approve NYNEX's Plan, NECTA contends that NYNEX's Plan cannot be allowed under existing Massachusetts law and suggests that legislation must be enacted to authorize the filing and approval of a price cap form of regulation (id. at 6).

NECTA maintains that the Department's decision in AT&T Communications of New England, Inc., D.P.U. 91-79 (1992), approving an alternative form of regulation for AT&T, offers no support for NYNEX's position because that decision expressly does not apply to NYNEX, and the Department was not asked to rule on the legal issues raised in NECTA's Motion (id. at 8). Also, NECTA argues that the "acid test" for the lawfulness of NYNEX's Plan is not what was decided in D.P.U. 91-79, but what the law permits, given that ratemaking is a legislative function (id. at 8-9, citing Boston Edison Co. v. City of Boston, 390 Mass. 772 (1984)).

NECTA contends that a cost-based cap on earnings similar to that adopted for NYNEX by the Rhode Island Public Utilities Commission would make the Plan consistent with statutes such as G.L. c. 159, § 20 (id. at 6). NECTA also notes that the Federal Communications Commission's ("FCC") price cap plan maintains a

nexus between carriers' rates, costs, and earnings, unlike the NYNEX Plan (id. at 7).

NECTA argues that the underlying purpose of statutes such as G.L. c. 159, §§ 26, 31, 32, and 34A, is to facilitate scrutiny of NYNEX's costs in order for the Department to determine whether rates are just and reasonable (id. at 11-12). NECTA asserts that the legislature did not intend that these statutes be effectively repealed by divorcing them from the process of establishing rates (id. at 12). NECTA contends that underlying several other statutes is a common assumption that G.L. c. 159 mandates a nexus between NYNEX's rates and total revenue requirement (id. at 12-13, citing G.L. c. 166, §§ 12A, 14, 22L; G.L. c. 6A, § 18D; and G.L. c. 25, §§ 17, 18).

Finally, NECTA asserts that NYNEX's filing must be dismissed if the Department is to establish by means of an orderly investigation the appropriate preconditions for alternative regulation (id. at 14).⁸

B. NYNEX

NYNEX argues that the Department must deny NECTA's Motion because there is no basis for dismissal of the Plan (Company Response at 11). NYNEX maintains that NECTA's contention that

⁸ NECTA also states that NYNEX is protected from liability to its customers based upon the assumption that its rates are cost-based (NECTA Reply at 14, citing Wilkinson v. New England Telephone and Telegraph Company, 327 Mass. 132, 136 (1951)).

legislation must be enacted to authorize the filing and approval of a price cap form of regulation is wrong and is unsupported by existing case law and Department precedent (id. at 2).⁹ NYNEX claims that no Massachusetts law or regulation specifically requires that the Department adhere to rate-of-return regulation for common carriers or conduct revenue requirement investigations to establish rates (id. at 3).¹⁰ NYNEX maintains that, absent such restrictions, the Department has broad authority to consider alternative regulatory frameworks (id. at 3-4, citing New England Telephone and Telegraph Company v. Department of Public Utilities, 371 Mass. 67, 85 (1976); New England Telephone and Telegraph Company v. Department of Public Utilities, 360 Mass. 443, 453 (1971); and New England Telephone and Telegraph Company v. Department of Public Utilities, 331 Mass. 604, 616 (1954)). NYNEX also maintains that the Department's decision in AT&T, D.P.U. 91-79, in which the Department reviewed and approved an

⁹ NYNEX also notes that other states with regulatory statutes comparable to those in Massachusetts have permitted price regulation without legislative changes (Company Response at 2, citing Rhode Island P.U.C. No. 1997 (1992); New York PSC Case No. 28961 (1987); New York PSC Opinion No. 87-22 (1987); and New York PSC Opinion No. 87-20 (1987)).

¹⁰ NYNEX also argues that the Department is not limited to a single ratemaking methodology under G.L. c. 159, § 20, and that, provided a methodology can produce just and reasonable rates, the Department has broad legal authority to implement that methodology (Company Response at 8, citing American Hoechst Corporation v. Department of Public Utilities, 379 Mass. 408 (1980)).

alternative form of regulation for AT&T, contradicts NECTA's claim that the Department lacks statutory authority to consider NYNEX's Plan (id. at 5).

Addressing NECTA's contention that the Department's decision in D.P.U. 84-267 is applicable precedent for the Department to dismiss NYNEX's filing, NYNEX claims that the "analogy is misplaced" because the Company is not seeking rate relief in the instant case, but rather requests the adoption of an alternative form of regulation (id. at 7). Also, NYNEX argues that none of the other statutes cited by NECTA (G.L. c. 159, §§ 26, 31, 32, and 34A) would preclude the Department's adoption of the Company's Plan because, according to NYNEX, the statutes cited by NECTA give the Department the authority to conduct certain investigations, but do not require that the Department do so (id. at 10).

C. Attorney General

The Attorney General argues that because of substantial doubts regarding the Department's authority to consider NYNEX's Plan,¹¹ the Department should defer the adoption of a new regulatory scheme pending a "now overdue comprehensive review of Massachusetts telecommunications regulatory policy/practices and any legislative changes that may be necessary to ensure that the

¹¹ The Attorney General notes that there is no Massachusetts precedent directly controlling on the question at issue (Attorney General Comments at 1).

Department has the authority to adopt new policies and practices" (Attorney General Comments at 1).

The Attorney General contends that there is cause to doubt whether the Department can adopt a form of regulation that ignores costs and at the same time satisfies the legislative mandate of G.L. c. 159 (id. at 2). The Attorney General acknowledges that the Department is not constrained to apply any particular form of rate regulation, but argues that earlier pronouncements by the Department, decisions by the Supreme Judicial Court, and actions taken in other jurisdictions, raise serious questions as to whether NYNEX's Plan is outside the range of discretion accorded the Department (id. at 2-3).

The Attorney General claims that the Department's past pronouncements have made it clear that the concept of just and reasonable rates has a nexus to costs in any form of regulation (id. at 3). The Attorney General asserts that NYNEX's Plan does not allow any consideration of costs in determining whether or not rates proposed by NYNEX will be approved (id. at 3-4).

D. Analysis and Findings

In ruling on NECTA's Motion to Dismiss, we must decide (1) whether the Company's filing is unlawful under G.L. c. 159, § 20 as a general increase in rates, and (2) whether Massachusetts law provides the Department with the authority to review and approve the Company's Plan for alternative

regulation.¹²

In the Department's Order on the Attorney General's Motion to Dismiss, we found that because the Company's filing was not a proper tariff filing, it could not constitute a request for a general increase in rates under G.L. c. 159, § 20. Interlocutory Order at 15. The issue of dismissal of the Company's filing as a request for a general rate increase has already been determined.¹³ Therefore, NECTA's Motion to Dismiss on the same ground is moot.

The second question raises more complex issues regarding whether Massachusetts law mandates any particular form of regulation, including rate-of-return regulation, to determine the reasonableness of rates, and whether the Department is limited to specific methods in its regulation of NYNEX.¹⁴

In its response to NYNEX's objection, NECTA made numerous

¹² We interpret NECTA's argument regarding the impediment to the Department's statutory authority for approving NYNEX's Plan to include more than G.L. c. 159, § 20 (i.e., according to NECTA, existing statutes relating to ratemaking prohibit Department review and approval of the Company's Plan, whether as a request for a general increase in rates, or as a petition for alternative regulation).

¹³ NECTA's Motion was filed prior to the Department's Order on the Attorney General's Motion to Dismiss. See Interlocutory Order.

¹⁴ While the Department has considered and approved an alternative form of regulation for a common carrier in the past (see AT&T, D.P.U. 91-79), the Department's authority in the AT&T case was never challenged by the parties in that proceeding.

additional arguments regarding the Department's jurisdiction that it did not raise in its initial Motion to Dismiss. NYNEX and other parties have not had an opportunity to respond to these additional arguments on the important issue of the Department's authority to implement the Company's proposal. Therefore, the Department will defer a ruling on NECTA's second ground for dismissal to allow for further arguments.¹⁵ The parties will have the opportunity to fully address this question on brief.

III. MOTIONS ON SCOPE

As noted previously, NYNEX, MCI, AT&T, the Attorney General, and NECTA have all filed motions regarding the scope of the proceedings. Each motion is discussed below.

A. Company Motion

In its motion to limit the scope of the proceeding, NYNEX contends that the principal issue raised by the Company's filing is "whether the Plan is a reasonable substitute for traditional rate-of-return regulation," and that other issues raised by parties, such as a traditional rate case investigation and market structure issues, are beyond the scope of the proceeding (Company Motion at 2-9). Therefore, the Company argues that the Department should limit its investigation to a determination of whether the Plan is consistent with the Department's statutory

¹⁵ Pursuant to 220 C.M.R. § 1.04(5)(b), the Department's continued deliberation on this motion for dismissal shall not delay the conduct of this proceeding.

mandate and furthers the Department's current regulatory policy goals for the telecommunications industry, as established in IntraLATA Competition, D.P.U. 1731 (1985) (id. at 2-3).¹⁶

NYNEX states that certain issues are "clearly within" the scope of the case. These include: (1) issues relating to economic theory of price regulation versus rate-of-return regulation; (2) specific components of the Plan, such as the term and pricing rules; (3) filing of new services and the standard of review for such filings; (4) service quality commitment levels and reporting requirements; (5) the scope and timing of infrastructure improvements; (6) the proposed rate freeze for residence basic exchange service; and (7) the proposed increase in the monthly credit for Lifeline customers. In addition, the reasonableness of the Company's current level of earnings, as supported by the testimony of Edward J. McQuaid and the financial information accompanying his testimony, is within the scope of the proceeding (id. at 3-7).

On the other hand, NYNEX argues that certain issues raised by other parties, e.g., revenue requirement, cost allocation, and rate design, are outside the scope of the case (id. at 2, 5-6). NYNEX argues that no statute or Department rule requires an

¹⁶ NYNEX also requests in its Motion that the Department "rule expeditiously" on its Motion and other pending motions, and promptly establish a complete procedural schedule (Company's Motion at 8).

investigation of cost studies and methodologies as a condition for adopting the Plan, and that such an investigation is not required to comply with G.L. c. 159, §§ 14 and 20 (id.). Moreover, the Company contends that the present level of earnings and present rate levels are appropriate starting points for implementation of the Plan (id. at 6).

In addition, the Company argues that market structure issues should not be addressed in this proceeding, but rather should be considered by the Department in a different forum as the "telecommunications marketplace in Massachusetts evolves" (id. at 7).

1. AT&T Response

In its Opposition to NYNEX's Motion, AT&T argues that any change in the form of regulation of NYNEX cannot be made without consideration of market structure and competition, including such issues as "1+ intraLATA presubscription, collocation of facilities, and unbundling of NYNEX's local exchange rates" (AT&T Response at 4-5). AT&T argues that NYNEX's request to exclude market structure and local competition issues from the scope of the proceeding is "directly contrary to the Department's often-repeated polic[y] ... pronouncements [that] ... regulatory issues are driven by marketplace realities" (id. at 4). AT&T contends that the Department has on several occasions stated that the "appropriate form of regulation for any telecommunications

carrier ... is inextricably interrelated with the development of competition in the markets in which such carriers operate" (id. at 2, citing IntraLATA Competition, D.P.U. 1731; AT&T, D.P.U. 91-79; and NET, D.P.U. 93-125).

B. MCI Motion¹⁷

In its Motion on Scope, MCI contends that the Department should dismiss the current petition and "open a generic telecommunications policy docket" to be merged with D.P.U. 90-206/91-66 (MCI Motion at 1-2). Such a generic docket, according to MCI, should be in three parts: (1) an alternative regulation inquiry, in which the Department would review the Company's Plan (including a revenue requirement proceeding) and the policy issues raised by the Plan; (2) an intraLATA toll competition inquiry, in which the Department would examine such issues as equal access, presubscription and the imputation standard; and (3) a local exchange competition inquiry, where the Department would address the necessary prerequisites for implementing local exchange competition (id.). MCI claims that removal of barriers to competitive entry should be addressed before reviewing NYNEX's Plan (id. at 2). In addition, MCI argues that there is no justification for deregulation of NYNEX's monopoly without "effective competition for its services" (id.).

¹⁷ In addition to its Motion on Scope, MCI filed a Motion to Consolidate, which raises more limited issues of scope (see Section IV.A, infra).

1. Company Response

In its Response to MCI's Motion, NYNEX contends that MCI's argument, that a failure to resolve market structure issues in this proceeding would impede continued development of competition, is "without merit" (Company Response at 2). The Company claims that parties can challenge any perceived anti-competitive aspects of the Plan during the proceeding, and the Department can take these factors into consideration in deciding whether to adopt the Plan (id. at 3).

C. AT&T Motion

AT&T requests that the Department define the scope of the proceeding to include all issues of intraLATA market structure and competition (AT&T Motion at 7). ¹⁸ As support for its Motion, AT&T contends that NYNEX's Plan to change the form under which the Company is regulated " cannot be decided without first considering the degree to which competition has already developed in the marketplace and the conditions for the further development of competition that must be imposed as appropriate or even necessary concomitants of a reduction in the regulatory oversight of NYNEX" (id. at 3, emphasis supplied). In addition, AT&T claims that Department precedent requires that the investigation

¹⁸ AT&T's Motion on Scope was filed along with a Motion to Consolidate this proceeding with the Department's docket D.P.U. 90-206/91-66. In this section, we only consider AT&T's Motion on Scope; in Section V.B, infra, we address AT&T's Motion to Consolidate.

of NYNEX's Plan for regulatory change must include an "investigation of competitive market structure issues," and, therefore, the Department is required to "consider ... all issues relating to the extent to which intraLATA competition has developed in Massachusetts as well as the condition that should attach to any reduction in the present regulatory oversight of [NYNEX] in order to ensure the further development of competitive forces in the intraLATA marketplace" (id. at 6, citing IntraLATA Competition, D.P.U. 1731).

1. Company Response

In its Opposition to AT&T's Motion, NYNEX states that the Company considers current market conditions as factors which the Department can take into consideration in reviewing the Plan but that market structure issues do not need to be resolved before first considering the Plan or as part of the proceeding (Company Response at 1). According to NYNEX, the Plan is a reasonable alternative to traditional rate-of-return regulation, regardless of the level of competition, and, therefore, approval of the Plan should not be conditioned on "whether and to what degree competition exists in Massachusetts at the present time" (id. 1-2). NYNEX also contends that resolution of market structure issues should not be a precondition to adoption of the Plan (id. at 2). The Company argues that an investigation of market structure issues in this docket would unnecessarily delay the

proceeding, and that more appropriate forums exists for resolution of those issues (id.).

D. Attorney General Motion

Regarding the scope of the proceeding, the Attorney General agrees with the suggestions of other parties and contends that the Department as a precondition to consideration of NYNEX's Plan should undertake "a comprehensive review of the Department's telecommunications policies and practices" (Attorney General Motion at 1-2). According to the Attorney General, given the dramatic current and expected changes in the telecommunications industry, "the Department should make every effort to determine where the industry is, where it is going, and by which path to this destination will telecommunications users and the public interest in general be best served" (id. at 3). To that end, the Attorney General proposes that the scope of the proceeding should include a review of the following areas: (1) the statutory authority to adopt alternative forms of regulation; (2) the advantages and disadvantages of traditional rate-of-return regulation, and possible improvements to the traditional model; (3) NYNEX's proposed price cap; (4) other forms of alternative regulation; (5) underlying issues that should be addressed when considering alternative forms of regulation, including implementation issues and rates issues; (6) local competition/market structure issues, including expanding the

opportunities for competition and network bottlenecks; and (7) the application of alternative forms of regulation on the gas, electric, and water utilities (id.).

E. NECTA Motion

NECTA contends that the scope of the proceeding should be necessarily broad because of the wide array of issues raised by the Company's Plan (NECTA Motion at 1). NECTA argues that it would be "irresponsible for the Department and inimical to the public interests" to limit the scope of the proceeding, and that the Department should conduct a "G.L. c. 159, § 14 type of investigation," similar to the comprehensive investigations being conducted by utility commissions in other New England states (id. at 3-4). Such a comprehensive investigation would include the issues raised by the Attorney General, MCI, NECTA, AT&T, and other parties, including market structure issues and the issue of cross subsidization of unregulated video services (id. at 1-4). Other issues that NECTA claims are within the scope of the proceeding are: (1) the "veracity" of the Company's operating results; (2) the reasonableness of NYNEX's existing rates as a starting point for the Plan; (3) the reasonableness of traditional rate regulation; (4) different forms of alternative regulation; (5) consumer protection issues; (6) general anti-competitive issues; and (7) the term of the Plan (id.).

F. Analysis and Findings

The parties have asked that the Department expand the scope of the proceeding to include four broad subjects: (1) a comprehensive review of telecommunications regulation in Massachusetts; (2) other forms of alternative regulation; (3) market structure; and (4) a full rate case.

It is important to note that in this proceeding the Department is investigating a petition by NYNEX for approval of a specific proposal for price cap regulation. The Company's petition does not raise, nor do we find it appropriate to examine, the very broad range of issues proposed by intervenors. We find it is more appropriate to define more narrowly the scope of this proceeding, for the reasons below.

First, we find that expanding this proceeding to include a comprehensive review of telecommunications regulation in the Commonwealth is unnecessary to our determination of the reasonableness or appropriateness of the Company's proposal for an alternative form of regulation. Even in the event that the NYNEX proposal, or a variant of it, is adopted, NYNEX will remain a regulated telecommunications provider, with all current responsibilities intact. This proceeding will not, by itself, alter the basic telecommunications structure of the Commonwealth. Therefore, the Department declines to conduct a generic telecommunications policy investigation in this docket.

Second, regarding the issue of alternative regulation, for

the same reasons as stated above, the Department will not expand the scope of this proceeding to include a generic investigation into other possible forms of alternative regulation for NYNEX (and other regulated utilities). Again, this case is limited solely to investigating NYNEX's petition for approval of its Plan. Of course, parties may propose modifications to the specific terms of NYNEX's Plan (e.g., a different productivity factor, alternative service groupings, a cap on earnings, etc.) or even advocate that the Department reject the Plan and maintain the current form of regulation. However, we find that proposals on other alternative forms of regulation (e.g., a social contract) for NYNEX, or evidence about other alternative forms of regulation as a basis for judging the reasonableness of NYNEX's Plan are beyond the scope of this proceeding, unless they can be explored as natural extensions of the Company's proposal.

Third, regarding the issue of market structure, we find that it is not necessary to resolve such issues before or during our investigation of NYNEX's Plan. The Department remains steadfastly committed to fostering a competitive marketplace for telecommunications in Massachusetts to achieve its policy goals. See IntraLATA Competition, D.P.U. 1731, at 26; NET, D.P.U. 93-125, at 5; Entry Deregulation, D.P.U. 93-98, at 11 (1994). Therefore, the Department will take great care not to approve an alternative form of regulation that gives NYNEX an

unfair advantage in a fully competitive marketplace.

Accordingly, it is unnecessary to delay review of the Plan pending resolution of market structure issues. If parties believe that NYNEX's Plan as filed will give the Company unfair competitive advantages, they may present evidence on that issue and should advocate specific changes to the Plan.

While we do not believe the resolution of market structure issues are necessary to our investigation in this proceeding, we note that market conditions are factors which the Department can take into consideration in reviewing the Plan. Because NYNEX argues that its Plan is reasonable regardless of the level of competition, parties who assert that price regulation is contingent upon achieving a certain level of competition should address that issue during hearings.

Lastly, regarding the issue of a full rate case review, we find that it is not necessary to conduct such an investigation of NYNEX before or during this proceeding. At this time, we believe that a more limited review which focuses on the reasonableness of NYNEX's earnings is sufficient to allow the Department to determine whether NYNEX's current rates are the appropriate starting point for the implementation of a price cap form of regulation. If, as a result of this limited examination, we determine that existing rates are not the appropriate starting point, the Department may determine that a more detailed

examination is necessary. Thus, we find that a review of the Company's revenue requirement, cost allocation, and rate structure is beyond the scope of the case. The Department will limit its investigation on the issue of the Company's current level of earnings to an examination of whether: (1) the adjustments prescribed by the Department in D.P.U. 86-33-G have been properly reflected in the test year account balances presented in NYNEX's filing; and (2) the resulting rate of return on investment is reasonable.

Accordingly, the motions on scope filed by MCI, AT&T, the Attorney General, and NECTA are denied. As to NYNEX, we find that those specific issues identified by the Company, as noted in Section III.A, supra, are within the scope of this proceeding, and, therefore, NYNEX's Motion is granted. However, the issues identified by the Company and deemed to be within the scope of the proceeding should not be considered as all-inclusive.¹⁹ The relevancy of additional issues may be determined by the Hearing Officers as the investigation progresses.

IV. MOTIONS TO CONSOLIDATE

A. MCI Motion

MCI in its motion maintains that there are similar issues in

¹⁹ For example, NYNEX states in its response to AT&T's opposition to the instant motion that current market conditions are factors which the Department can take into consideration in reviewing the Plan (Company Response at 1).

D.P.U. 94-50 and D.P.U. 90-206/91-66, including the development of local competition and the costing and pricing of unbundled network elements (MCI Motion at 1-2). Accordingly, MCI argues that it is necessary that these issues be resolved prior to or concurrently with implementing an alternative regulation plan for NYNEX (id. at 2).

MCI claims that the end result of the process in the collocation docket, D.P.U. 90-206/91-66, should be the offering of new tariffed services by NYNEX, including unbundled network elements, and the setting of interconnection charges, and that these services should be "identified, costed, and priced," before the introduction of NYNEX's Plan (id. at 3). MCI contends that, under the Plan, NYNEX will be able to price these new services at any rate above incremental cost, giving NYNEX substantial power to curtail or prevent local competition (id.).

MCI states that the instant case may redefine regulation for NYNEX for at least ten years, and argues that the Department should establish ground rules and policies to foster effective local competition in Massachusetts before allowing NYNEX to operate with "substantial regulatory flexibility" (id.). According to MCI, those ground rules and policies are already issues to be determined in docket D.P.U. 90-206/91-66, so the Department should consolidate that docket with this proceeding (MCI Reply at 6).

In response to NYNEX's contention that its Plan is sufficient for investigation on a stand-alone basis, MCI asserts that while it is theoretically possible to implement an alternative regulatory scheme without resolving market structure issues, an issue for the Department to resolve is whether adopting alternative regulation, such as NYNEX's Plan, without reviewing market structure issues is sound public policy (id. at 6).

MCI maintains that, contrary to NYNEX's characterization, its Motion is not intended to broaden the scope of the investigation in D.P.U. 94-50, but raises the more narrow question of whether there are overlapping issues in the two dockets that need to be resolved concurrently (id. at 3). MCI argues that both dockets deal with the issues of how to price unbundled local exchange network elements and the terms and conditions under which they will be offered (id. at 3-4).

Regarding NYNEX's argument that MCI's Motion should be denied because the Company's Plan contains a mechanism for parties to challenge new tariff offerings, MCI argues that the Plan provides NYNEX with extreme flexibility in the pricing of new services, and that it limits the parties' and the Department's ability to review such filings (id. at 4).²⁰

²⁰ MCI cites four aspects of the Company's Plan to support its contention that the Plan limits parties' and the
(continued...)

MCI argues that NYNEX's Plan is more than a price cap proposal, it is a broad plan for alternative regulation to cover all of NYNEX's services (id.). MCI also maintains that because NYNEX's Plan is for a ten-year period, the Department cannot reasonably review the Plan without examining competitive issues and market structure (id. at 7).

MCI asserts that the FCC's decision on price caps ²¹ undermines NYNEX's opposition to consolidation because NYNEX's intrastate services are broader and cut across more market segments than NYNEX's interstate services (id., n.4).

1. Company Response

NYNEX argues that MCI's Motion should be denied because MCI has provided no basis for the Department to consolidate the

²⁰(...continued)

Department's ability to review NYNEX's tariff filings for new services: (1) the effective date of tariffs will not be suspended pending the outcome of an investigation; (2) a tariff filing could not be rejected unless it had an unreasonable, material adverse impact on competition; (3) the burden of proving the aforementioned standard would be on the party challenging the tariff; and (4) a filing could not be deemed anticompetitive if the incremental revenues are at least equal to the incremental costs (MCI Reply at 4, citing NYNEX's Plan, Section 4(c)(4-5)).

²¹ Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6790-6791 (1990), Erratum, 5 FCC Rcd 7664, modified on recon., 6 FCC Rcd 2637 (1991), aff'd, National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993) .

proceedings (Company Response at 1). ²² NYNEX claims that its Plan would be appropriate in the absence of a competitive marketplace, and that the Plan can be addressed by the Department without first resolving market structure issues (id. at 3).

NYNEX maintains that its Plan includes evidence demonstrating problems with rate-of-return regulation and the benefits to consumers associated with price cap regulation (id.). The Company asserts that, based on its case, the Department can consider improvements in the form of regulation it exercises over the Company without determining the issues that MCI would interject into the proceeding (id. at 4). In addition, NYNEX argues that it would be inappropriate to seek a resolution of market structure issues at this point because it would require that the Department prejudge the issue of whether a new regulatory model should be adopted for the Company (id.).

NYNEX contends that the disposition of market structure issues is not necessary for parties to raise claims regarding the reasonableness of the Plan in light of competitive conditions (id. at 5). Also, NYNEX argues that, in the FCC's decision approving price cap regulation for local exchange carriers' interstate access services, the FCC noted that incentive regulatory models can be addressed on their own merits and are

²² NYNEX maintains that MCI's Motion is only a procedural mechanism for broadening the scope of the docket to include market structure issues (Company Response at 2).

not dependent upon particular competitive characteristics within the relevant market (id. at 6-7, citing Policy and Rules Concerning Rates for Dominant Carriers , supra , n.19).

NYNEX maintains that no jurisdiction has resolved the entire list of issues that MCI and others urge the Department resolve as a condition for investigating the Plan, even though a number of states have reviewed and approved incentive regulation plans for local exchange carriers (id. at 7).

Regarding MCI's assertion that the Plan would allow NYNEX to price new tariff offerings anti-competitively, NYNEX notes that the regulatory review process recommended in the Plan includes a mechanism for parties to challenge new tariff offerings (id. at 9). Moreover, according to NYNEX, MCI may argue in the course of this proceeding that the type of tariff review process proposed by NYNEX is inadequate, and NYNEX asserts that the Department does not have to decide underlying market structure issues in order to review such claims (id.).

2. Attorney General

The Attorney General supports MCI's Motion and argues that there are common questions of law or fact in the dockets at issue in the motion (Attorney General Comments at 1). The Attorney General argues that consolidating these cases and resolving the issues within the framework of one case will minimize the costs and delay that will result if these dockets are heard separately

(id. at 2).

3. NECTA

NECTA supports MCI's Motion and argues that NYNEX has opened up all of its rates, including collocation rates, to investigation by virtue of its filing (NECTA Comments at 2).²³ NECTA argues that NYNEX cannot limit the types of challenges to its proposal by other parties on the basis of the limited contents of its filing (id. at 3). NECTA argues that interested parties should be allowed to raise through consolidation of other dockets, or otherwise in this case, revisions to NYNEX's Plan (id. at 4).

NECTA also maintains that because NYNEX in its filing has offered to accelerate certain construction activity and conform to quality of service standards, other parties are free to propose modifications, such as the timetable for expanded collocation and modifications to collocation rates (id. at 2). NECTA asserts that the need to provide for separation of video-related revenue requirements away from the ongoing basis upon which price cap-based telephone rates will escalate is essential (id. at 3).

²³ NECTA notes that consolidation is generally committed to the decision-makers discretion, and that consolidation is permitted as a matter of convenience and economy where actions appear to be of like nature or involve common questions of law or facts (NECTA Comments at 2, citing Mass. R. Civ. P. 42; Skirvin v. Mesta, 141 F.2d (10th Cir. 1944); and Feldman v. Hanley, 49 FRD 48 (D.C. NY 1969)).

4. Teleport

Teleport supports MCI's Motion because of the "substantial overlap of certain major issues" in the dockets (Teleport Comments at 1-2). Teleport contends that "adequate consideration of the relevant issues will be best accomplished" through consolidation, and that such a joint investigation will require more than six-months for Department review (id. at 2). For example, according to Teleport, because NYNEX's Plan includes streamlined procedures for the filing of, and Department review of, new services, it proposes a process that will directly impact the way the Department allows NYNEX to make available and price network elements (id. at 3). Teleport also contends that for the Department to investigate NYNEX's Plan without first resolving local competition issues would be contrary to the public interest because the Department "may create a regulatory environment unrelated to the realities of the local telecommunications marketplace" (id. at 4-5).

5. MFS

In its comments in support of MCI's Motion, MFS contends that the dockets contain "common and interdependent questions of fact and law which necessarily must be considered together" (MFS Comments at 1-2). According to MFS, consolidation is required because it is "inappropriate and contrary to the public interest" to investigate NYNEX's Plan without also examining local

competition issues (id. at 3). MFS claims that, contrary to NYNEX's claims, the Plan will control the terms and conditions under which local competition will operate in Massachusetts (id. at 4, n.3). MFS claims that serious consideration of the Plan must take into account its effect upon competition (id. at 4). Finally, MFS argues that NYNEX is contradicting itself by contending that MCI's issues are not relevant while at the same time stating that parties will have a chance to raise such irrelevant issues during the proceeding (id. at 5).

6. AT&T

AT&T supports MCI's Motion for the reasons cited by MCI (AT&T Comments at 1).

B. AT&T Motion

In arguing for consolidation of this proceeding with the Department's docket in D.P.U. 90-206/91-66, AT&T contends that the "issues raised in D.P.U. 90-206/91-66 are a subset of the intraLATA market structure and competition issues that [were noted by AT&T in its Motion on Scope] must be considered in this case" (AT&T Motion at 7). AT&T argues that consolidation is necessary for those reasons cited in its Motion on Scope (id. at 1-7).

C. Analysis and Findings

The Department's procedural rule at 220 C.M.R. § 1.09 states that the Department may consolidate dockets where there are

common questions of law or fact. The Department has in the past exercised this discretion when it has deemed it appropriate. See e.g. Fall River Gas Company, D.P.U. 93-147/93-172, at 1 (1993); Taunton Municipal Lighting Plant, D.P.U. 91-273/92-273 (1993); New England Telephone and Telegraph Company, D.P.U. 88-45 (1989); see also Tennessee Gas Pipeline Company, D.P.U. 92-264 (1993) (consolidation not ordered).

We have determined, as noted above, that we need not resolve market structure issues prior to, or concurrent with, a review of NYNEX's proposal for alternative regulation. Collocation and interconnection are essentially market structure issues -- not pricing mechanisms. Therefore, we find that it would not be appropriate to consolidate these dockets, and we accordingly deny the Motions to Consolidate of MCI and AT&T.

In addition, according to the terms of the stipulation signed by NYNEX and MFS/McCourt and approved by the Department on December 29, 1993 in the Department's collocation docket, D.P.U. 90-206/91-66, there are ongoing discussions that may lead to a settlement of some or all of the complex issues surrounding local competition. See NET, D.P.U. 90-206-B/91-66-B. Regardless of whether a settlement is reached, the issue of local competition will come before the Department by September 29 of this year when NYNEX submits its collocation filing with the Department. We find that a review of NYNEX's Plan in this case

should not, however, be delayed by, or be contingent upon, a review by the Department of the collocation filing.

V. NYNEX MOTION TO DEFER TRANSITIONAL FILING

A. Company

The Company contends that the Plan will "provide[] for a more gradual change in rates" than under the two remaining steps in the transitional rate restructuring process, and "will make unnecessary further transitional filings" (Company Motion at 2, 4). NYNEX states that although switched access rates will move to target levels under the Plan, the Company's proposal for alternative regulation "is intended as a substitute for the traditional regulatory framework under which NYNEX functions, including the transitional rate design process, and proposes specific pricing rules that would otherwise govern changes in NYNEX prices for the future" (id. at 1-2). NYNEX contends that because of the important and unique issues raised by the Company's filing, "deferral ... is clearly warranted" (id. at 4). Moreover, the Company states that the Department could determine after its review of the Company's Plan that additional transitional filings are necessary (id. at 4).

NYNEX argues that the opposition of parties to the Motion to Defer is in fact opposition to the Company's Plan which would "establish a new regulatory framework for NYNEX that differs from, and is a substitute for, the transition process" (Company

Reply at 3). The Company maintains that "it is precisely because such [change in Department regulatory policy] is possible ... that deferral" of the transitional filing is justified (id. at 3-4). NYNEX states that it would be unreasonable for the Department to require the Company to make its next transitional filing "while it is simultaneously considering a possible substitute for the current ... rate-of-return methods underlying the transitional rate design process" (id. at 4).

With regard to MCI's concern about a delay in the timing of switched access rate reductions, the Company contends that under the Company's Plan interexchange carriers, including MCI, will see the same switched access rate reductions "in approximately the same time period" as would have been implemented under remaining steps of the transitional rate redesign process" (id. at 7).

B. AT&T

In opposing NYNEX's Motion to Defer, ²⁴ AT&T argues that the motion should be denied because the Company has not shown that a deferral is justified (AT&T Response at 5). ²⁵ AT&T contends that

²⁴ The only party to support NYNEX's Motion was the Attorney General, although his support appears to be predicated on a decision by the Department to require a traditional rate case in this proceeding (Attorney General Motion to Dismiss at 9, n.3).

²⁵ AT&T contends that, in fact, NYNEX's Motion is not for deferral but rather for abandonment of the transitional rate (continued...)

by allowing NYNEX's Motion, the Department will "effectively reverse[]" its commitment to the transitional rate process (id. at 2-3). According to AT&T, cost-based rates are crucial to effective intraLATA competition in Massachusetts (id. at 3). AT&T asserts that NYNEX has not shown why the transitional process should be discontinued and why it is no longer appropriate to reach target rates (id. at 4). Moreover, AT&T claims that current rates, which NYNEX has proposed to use as the starting point for the Plan, are "presumptively not just and reasonable over the long term" (id.). Finally, AT&T maintains that it would be unwise to delay or abandon the transitional rate process pending the Department's review in this case, since "[i]t is uncertain at this time what the outcome of the Department's review of NET's proposal will be" (id.).

C. MCI

MCI agrees with AT&T's reasons for opposing NYNEX's Motion (MCI Response at 2). In addition, MCI claims that the "mere filing" of NYNEX's Plan for alternative regulation should not relieve the Company of its transitional filing requirements" (id. at 1). MCI contends that there are no legitimate reasons for the Department to allow NYNEX to delay previously ordered rate

²⁵(...continued)

restructuring process, since NYNEX indicates in its Motion that approval of the Plan by the Department will render additional filings moot (AT&T Response at 3).

reductions in switched access as a result of the Company's Motion, and that the Department should show "reasoned consistency" in moving those rates to target levels according to the timetable of the transitional process (id.).

D. NECTA

NECTA states that the Department has "vigorously reaffirmed" its commitment to the transitional rate restructuring process as recently as January of this year and it would be "erroneous" to now abandon that "decade long" process prior to its completion (NECTA Response at 12). To do so, according to NECTA, would undermine the Department's goal of implementing cost-based rates in order to encourage "meaningful intraLATA competition" (id.). In addition, NECTA notes that the Department in the past has rejected proposals that would deter the transitional rate process (id., citing NET, D.P.U. 92-100).

E. DOD

DOD opposes the Company's Motion to Defer and "strongly urges the Department to reject [a] unilateral attempt of the Company ... to halt the transitional rate process" (DOD Response at 1). DOD contends that to defer the transitional process would be a retreat from Department policy established five years ago (id.).

F. Analysis and Findings

Pursuant to the Department's Order in D.P.U. 93-125, NYNEX

is required to complete the transitional rate restructuring process in two additional filings, with the next filing to be made this year. NET, D.P.U. 93-125, at 77. As the parties note, the Department has been committed to moving rates to their cost-based levels through the transitional rate process. However, NYNEX's Plan proposes a radical departure from the way in which the Department currently regulates the Company's intrastate operations -- a change that would replace the current rate-of-return method as well as the transitional rate restructuring.

NYNEX is proposing that its current rates be used as the starting point for the Plan, but its 1994 transition filing would modify the current rates. Such modifications would be unnecessary if the Department were to approve the Company's proposal to use its current rates as the starting point for the Plan. Therefore, it would be inefficient for the Department to continue with the transitional rate process while reviewing the Plan.

The Plan also calls for elimination of the transitional rate process and replacement with a form of regulation, that, according to the Company, would be a better method for the Department to achieve the specific telecommunications policy goals which underlie the transitional rate process. Therefore, deferral of this year's transitional filing is not an

unreasonable measure, pending the Department's investigation of the Company's proposal. Accordingly, we grant the Company's Motion to Defer the filing of its 1994 transitional rate filing. It should be noted that the Department's approval of the Company's Motion is not an abandonment by the Department of the transition to target rates, it is a deferral of the process pending the outcome of the investigation into NYNEX's Plan. Accordingly, in the final decision in this case, the Department will issue specific directives, if circumstances warrant, on the timing of the next transitional filing.

VI. CONCLUSION

Given the above findings regarding the motions under consideration, the Department deems it appropriate to establish a complete procedural schedule in this proceeding. Therefore, the Department will hold a second procedural conference on June 20, 1994, at 10:00 A.M. at the offices of the Department, to determine a procedural schedule governing the orderly conduct of the balance of this proceeding. ²⁶ This Order shall serve as notice to parties in this case of that procedural conference. The Department encourages all parties that desire to be heard regarding the determination of the procedural schedule to be present at the June 20, 1994 procedural conference.

²⁶ A copy of the Department's proposed procedural schedule is attached as Appendix A.

VII. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion to Dismiss of the New England Cable Television Association, Inc., filed with the Department on May 11, 1994, be and hereby is DENIED on the issue of whether the Company's filing is unlawful under G.L. c. 159, § 20, as a general increase in rates, and is DEFERRED on the issue of whether Massachusetts law provides the Department with the authority to review and approve the Company's Plan for alternative regulation; and it is

FURTHER ORDERED: That the Motion on Scope of New England Telephone and Telegraph Company d/b/a NYNEX, filed with the Department on May 20, 1994, be and hereby is GRANTED; and it is

FURTHER ORDERED: That the Motions on Scope of MCI Telecommunications Corporation, AT&T Communications of New England, Inc., the Attorney General of the Commonwealth of Massachusetts, and the New England Cable Television Association, Inc., filed with the Department on May 20, 1994, be and hereby are DENIED; and it is

FURTHER ORDERED: That the Motions to Consolidate of MCI Telecommunications Corporation and AT&T Communications of New England, Inc., filed with the Department on May 9 and 20, 1994, respectively, be and hereby are DENIED; and it is

FURTHER ORDERED: That the Motion to Defer the Filing of the

1994 Transitional Rate Design Filing of New England Telephone and Telegraph Company d/b/a NYNEX, filed on April 14, 1994, be and hereby is GRANTED.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner